Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

CHAD HOWARD PERSON
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Question Presented is:

Whether the Eighth Amendment's ban on cruel and unusual punishments prohibits a United States District Court from imposing a mandatory minimum term-of-years sentence without first applying the proportionality review adopted in *Graham v. Florida*, -- U.S.--, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010).

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PETITION FOR WRIT OF CERTIORARI

NOW COMES CHAD HOWARD PERSON, Petitioner, and requests that this Court issue a Writ of Certiorari to the United States District Court for the Middle District of North Carolina to review the Judgment of the Honorable Thomas D. Schroeder, sentencing the Petitioner to a mandatory minimum imprisonment of 120 months, entered on October 15, 2009.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (APP 2) is unreported. The Court of Appeal's order declining rehearing (APP 5) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 10(c) of the United States Supreme Court Rules.

CONSTITUTIONAL AUTHORITY INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Petitioner pled guilty, pursuant to a written plea agreement, to one count of distribution of 12.5 grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B) (2006). At the sentencing hearing, following defense counsel's submission of position papers and oral argument, the sentencing judge stated in his oral findings that without the statutory mandatory minimum, the Court would have been inclined to have sentenced below the statutory minimum in this case (APP 17). The Defendant-Petitioner was sentenced in the District Court to the mandatory minimum 120 months imprisonment (APP 17).

On appeal before the United States Court of Appeals for the Fourth Circuit, Petitioner argued that his mandatory minimum sentence violated the Eighth Amendment's ban on cruel and unusual punishments. After the Supreme Court ruled in *Graham v. Florida*, -- U.S.--, 130 S.Ct. 2001, 176 L.Ed. 2d 825 but prior to the Fourth Circuit ruling on the appeal, Petitioner notified the appellate court of the Supreme Court's ruling in that case by letter, pursuant to F.R.A.P. 28(j) (APP 28). On June 4, 2010, the Court of Appeals rejected Petitioner's Eighth Amendment argument. Petitioner moved for rehearing in light of this Court's recent decision in *Graham v. Florida*, -- U.S. --, 130 S.Ct. 2011, 2010 WL 1946731 (2010) and that hearing was denied (APP 22).

REASONS WHY THE WRIT SHOULD ISSUE

"The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense." *Graham v. Florida*, -- U.S.--, 130 S.Ct. 2011, 176 L.Ed. 825 (2010). The majority and concurring opinions of *Graham* relied on the controlling opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991)(affirmed in *Ewing v. California*, 538 U.S. 11, 111 S.Ct. 2680, 115 L.Ed. 2d 836 (2003)) for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. *Graham*, -- U.S. at --, 130 S.Ct. at 2021. The Court employed the "narrow proportionality principle" prescribed by Justice Kennedy in *Harmelin* which requires a sentencing court to "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions" where there is an inference of gross disproportionality. *Id.* (internal quotations and citations omitted). "If this comparative analysis validate[s] an initial judgment that [the] sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.*

This Court should review this case to determine whether the Eighth Amendment's ban

against disproportionate sentences is warranted where an offender is sentenced to a mandatory minimum, non-life term of imprisonment without permitting the district court discretion to apply Justice Kennedy's test for proportionality prescribed in *Harmelin* and adopted in *Graham*.

This Court, in particular, needs to review this case and address the question presented as the federal circuit and state courts have not agreed. Specifically, federal appellate courts in the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits have adopted Justice Kennedy's *Harmelin* test for conducting Eighth Amendment analysis. *See* Exhibit A (APP 30). The Fourth Circuit, which heard the Petitioner's case below, has not. *United States v. Kratsas*, 45 F. 3d 63 (4th Cir. 1995). Further, a majority of states have also adopted Justice Kennedy's *Harmelin* approach. *See* Exhibit B (APP 33).

In addition, granting certiorari is the humane thing to do. To imprison an offender categorically, to deny a sentencing court *any* discretion or consideration of the defendant in light of similarly situated defendants, offends society's notions of justice. There is no principled reason to limit consideration of the insignificant nature of an offender's character only to life-without-parole or death penalty cases. *See Solem v. Helm*, 463 U.S.277, 289, 130 S.Ct. 3001, 3009, 77 L.Ed. 2d 637 (1983)("When we have applied the proportionality

principle in capital cases, we have drawn no distinction with cases of imprisonment."); *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 599 2 L.Ed. 2d 630 (1958)(plurality opinion)(establishing, in a non-death penalty case, that the Eighth Amendment must draw its meaning from the "evolving standards of decency that mark the progress of a maturing society").

The fact that life-without-parole or the death penalty is different from the Petitioner's 120 month mandatory minimum sentence is not a sufficient argument, *see Tison v. Arizona*, 481 U.S. 137, 149, 107 S.Ct. 1676, 1683 95 L.Ed.2d 127 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed. 2d 944 (1976)(plurality opinion), because that argument is nothing more than a restatement of the basic principal that the Eighth Amendment forbids "only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 100)(internal citations and quotations omitted).

CONCLUSION

For these reasons, this Court should grant certiorari, consider this case on the merits, and answer the question presented. This Court should determine whether the Eighth Amendment requires the proportionality review of Justice Kennedy's *Harmelin* test when imposing statutorily required mandatory minimum, non-life sentences, and which

a majority of circuits and states, excluding the Fourth Circuit, have adopted.

Respectfully submitted,

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APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-4986

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

CHAD HOWARD PERSON,
Defendant – Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas David Schroeder, District Judge. (1:08-cr-00217-TDS-1)

Submitted: June 1, 2010
Decided: June 4, 2010

Before GREGORY, SHEDD, and KEENAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Patrick M. Mincey, James R. Van Camp, VAN CAMP, MEACHAM & NEWMAN, PLLC, Pinehurst, North Carolina, for Appellant. Anna Mills Wagoner, United States Attorney, Terry M. Meinecke, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Chad Howard Person pled guilty, pursuant to a written plea agreement, to one count of distribution of 12.5 grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(2006), and was sentenced to the statutory minimum of 120 months imprisonment. Person appeals, challenging the mandatory minimum sentence imposed by the district court.

Because the Government did not move for a downward departure to reflect substantial assistance, the district court had no authority to depart below the mandatory minimum. 18 U.S.C. § 3553(e); *Melendez v. United States*, 518 U.S. 120, 125-26 (1996). *See also United States v. Robinson*, 404 F.3d 850, 862 (4th Cir. 2005) ([*United States v. Booker*, 543 U.S. 220 (2005)] did nothing to alter the rule that judges cannot depart below a statutorily provided minimum sentence."). And, contrary to Person's assertion, the mandatory minimum sentence does not violate the Eighth Amendment. *See United States v. Thomas*, 900 F.2d 37 (4th Cir. 1990) (noting that Eighth Amendment review applies only to sentences of death or life without parole). Because a panel of this court may not overrule the precedent set by a prior panel of this

court, we reject Person's argument. *Mentavlos v. Anderson*, 249 F.3d 301, 312 n. 4 (4th Cir. 2001).

Therefore, we affirm Person's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

FILED: July 26, 2010
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 09-4986
(1:08-cr-00217-TDS-1)

UNITED STATES OF AMERICA
Plaintiff – Appellee
v.
CHAD HOWARD PERSON
Defendant-Appellant

ORDER

The Court denies the petition for rehearing.

Entered at the discretion of the panel: Judge Gregory, Judge Shedd and Judge Keenan. For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	)
DOCKET NO. 1:08CR217-1	)
	)
vs.	)
	)
Greensboro, North Carolina	)
CHAD HOWARD PERSON	)
September 23, 2009	

11:56 a.m.

TRANSCRIPT OF THE SENTENCING HEARING BEFORE THE HONORABLE THOMAS D. SCHROEDER
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenotype reporter.
Transcript produced by computer-aided transcription.

BRIANA NESBIT, RPR OFFICIAL COURT - REPORTER (336)254-7464

P R O C E E D I N G S

(The Defendant was present.)

THE COURT: Mr. Meinecke, do you want to call the next matter?

MR. MEINECKE: This is United States versus Chad Howard Person, Case Number 1:08CR217-1. Mr. Van Camp is present on behalf of the defendant, Your Honor. This matter is on for sentencing.

THE COURT: Good morning.

MR. VAN CAMP: It is still—I was wondering if we were going to get—those seats get hard back there, Your Honor.

THE COURT: Yes. We'll try to do something about that.

We are here today for sentencing. Let the record

reflect that a representative of probation is here as well.
Have you had an opportunity to review the presentence report?
MR. VAN CAMP: I have, Your Honor.
THE COURT: Have you done that with your client?
MR. VAN CAMP: I have.
THE COURT: Are you prepared to proceed today with sentencing?
MR. VAN CAMP: We are.
THE COURT: Let me ask your client. Mr. Person, have you reviewed the presentence report in your case?
THE DEFENDANT: Yes, sir.
THE COURT: Did you do that with you lawyer?
THE DEFENDANT: Yes, sir.
THE COURT: Are you satisfied that you understand the contents of your presentence report?
THE DEFENDANT: Yes, sir.
THE COURT: Are you satisfied that you understand the contents of your presentence report?
THE DEFENDANT: Yes, sir.
THE COURT: Thank you. You may have a seat, sir. I received a position paper, sentencing memorandum, from the defendant, which is Document 24. I believe, in addition to the presentence report, those are the only documents that I have received.
Is there anything else that's been filed in the case?
MR. MEINECKE: We did, Your Honor. We filed our response to the position paper yesterday. It

appears that that is Document 25.
MR VAN CAMP: We got a copy of that, Your Honor.
THE COURT: Give me just a moment then. Do I anticipate that this is the Government's usual, if you will, response as to the disparity between crack and powder cocaine?

MR. MEINECKE: It is, Your Honor. The only additional section, very briefly, within a paragraph or two addresses the defendant's argument with respect to his
criminal history.
THE COURT: All right. Give me just a moment. It must have been filed or at least put on the system a little later in the day.
MR. MEINECKE: It was after 4:00. I think the defendant's motion was filed Monday. I tried to file a response as soon as possible.
THE COURT: When I have court over here in Greensboro, I don't pull things up in the evening. Give me a minute. I am going to read this paper then. (Reading.)
All right. I have read the Government's position paper, which is Document 25. Are there objections to the presentence report.
MR. VAN CAMP: No other than those we've raised, if Your Honor please. The answer is "no" to your question. We have raised, obviously, issues about the powder and the crack issue in which—that's not a variation that we are requesting at this time.
THE COURT: That's more in the nature of a

variance?
MR : VAN CAMP: That's correct.
THE COURT: As to the presentence report, the Court will adopt the presentence report without change. As to all matters in the presentence report, the Court adopts as findings of fact.
We are here today to consider the imposition of a sentence in this case. The defendant has pleaded guilty to distribution of cocaine base, or crack cocaine, in violation of Title 21 of the U.S. Code, Sections 841(a)(1) and (b)(1)(B), as charged in Count Two of the indictment.
And my notes reflect that I have accepted the plea already, is that correct?
MR VAN CAMP: That's correct, Your Honor.
THE COURT: Taking the guidelines into account then on an advisory basis, it would appear that the following calculations result: Total offense level is 21; criminal history category is 6; the guideline imprisonment range is 120 months because—that is enhanced because of the information of prior conviction. In the absence of it, it would be 77 to 96 months; but because of the prior conviction, there is an enhancement in the range of 120 months. The statute requires no less than ten years or not more than life.

There is a guideline supervised release range available upon revocation of 8 years. The fine range is $7,500 to $4 million. Community restitution on Count Two is not more than $ 4 million.

Do the parties agree that these are the appropriate guidelines?

MR VAN CAMP: Yes, sir.
MR. MEINECKE: We do, Your Honor.
THE COURT: The Court finds that the calculations resulting from an application of the guidelines have been appropriately determined.

Now, in addition to considering the guidelines on an advisory basis and considering the factors under 3553(a), I'll hear from you as to any other factor you would like to present now.

MR VAN CAMP: Your Honor please, without re-arguing our memorandum, which you have looked at, we contend based upon this being crack cocaine and the various arguments that were set forth—as set forth in our memorandum, that there should be a one-to-one determination as to the powder and crack, as has been argued previously in this court this morning I've heard.

And also, if the Court please, our argument on the—his record is—what we contend that he should be a Level V and not a VI, and I Think the presentence report indicated the reason for that is that—if the Court will look at that record, you will see that most of them are traffic offenses. Nine out of sixteen are traffic offenses.

Yes, they may be a little more egregious than a speeding ticket, but they are not certainly DWIs or those types of situations and we contend that because of the relatively minor—and I realized I am using minor in a relative sense. We don't think those should be considered to bring him to a Level VI consideration.

Now, the next thing the Court may ask is,

well, Mr. Van Camp, if I have to consider – if I consider all those things, are we not still at 120 months?

THE COURT: I was wondering about that.

MR. VAN CAMP: So what am I doing? Well, let me tell you what I am doing.

Post-Booker, there seems to be in the various cases an indication by the court that the courts are to be given more leeway, greater discretion than they were subject, obviously, to knowing what type of guidelines are mandatory.

Even the Third and the Fifth and the Ninth Circuits have said that mandatories are not always going to be considered by the courts those circuits. So there is a movement, and I realize this Court on this day at this time is not going to make a decision that is going to change the course of what the Fourth Circuit does in its courts, but I want to argue this because I think—if you look at the plea agreement- - Mr. Meinecke and I have had this discussion before in another case – it leaves a person to believe that there are various considerations for his plea, that the Court has some discretion. And, yes, it does say in there subject to the mandatory minimums. It does say that, but then it goes on to say you get two points or one point, as if somehow the guidelines are some consideration to this Court when, in fact, it may well be, but you are stuck at the 120 months, and you don't have any discretion.

THE COURT: I can go up.

MR VAN CAMP: You can go up. I don't

mean that, but what I am saying is where you have a person who is below the guidelines, a in this case, 77 to whatever it was—it was below—certainly 120 months, which is what you accepted in the report—you could go up, but where they are somewhat below in this case, it really doesn't make any difference because we are stuck at 120 months or—I don't mean to imply that you couldn't do—I mean—having said that, you talked—I've been a defense attorney now for 45 years. I talked to my client. I said, well, you are going—if you plead guilty, you are going to get some consideration; but the truth of the matter is you don't if it's a mandatory minimum necessarily.

On a clean page in this case, without the mandatory, my client—if you did the one-to-one on the coke and the crack or the powder and if you consider our argument on the lesser relevant degree of criminal history, you would have somebody that possibly could be a 10 at Level V for sentencing, which the period of time would be somewhere between 24 and 36 months, but we can't go there. WE can't even use that in considering the three-point or the two-point reduction, depending on how the Court would rule on that.

I don't know if I am making an great deal of sense, but I am trying. I will say this: It is the mandatory minimums in a case like this, when you consider all the cases that you heard this morning and I listened to them, too—the fellow who is going to get 15 or 16 years, whatever that guy had—this is probably improper, but I'm going to say it. Considering his record of two misdemeanors and he

has one felony and then a marijuana charge, not a sale, possession with intent and two misdemeanor marijuana charges, along with—after that you have to look at the driving while license revokes to get him up to that. It just—it doesn't make sense in the context of the big picture.

I know I am not here in Congress, and I know we are not in the legislature. We are in a court of law that has to apply the law as it is handed down to them. I respect that. I don't want to take up too much of your lunchtime.

THE COURT: I hesitate to say it, but I won't go to lunch for a little while yet.

MR. VAN CAMP: Well, that's where we are. I submitted my memorandum in the spirit of what I am talking about now; and while the Court may say, well, he didn't have to spend the time to do that, but I did because I am sincere about this argument.

I think some day maybe these mandatory minimums and these kinds of things that are not fair to my client, I don't think—it is my job to do that, but I sincerely in the context of all these other cases that we have been hearing—ten years, if that is what the Court will give him, which is the minimum, is out of—particularly, looking at what he's been charged with—I mean, the Court and I had a case last week where a guy had $700,000 in his safe and I don't know how many pounds of cocaine he had. He got ten years, too. I shouldn't argue about that one, but my guy is going to get the same thing for this.

You should have discretion in my view to consider those factors. Thank you, Your Honor.

THE COURT: The cases in the Fourth Circuit—my recollection is thtat they appeal to the statute that says the only way I can depart below a statutory mandatory minimum is with a 5K1.1 or a safetfy valve under 3553(f).

MR. VAN CAMP: I can't—the safety valve does not apply in his case, but may I talk about that for a moment?

My client has offered—and Mr. Meinecke knows this because I called Mr. Meinecke, and he knows about it. In fact, he checked with the officers to do some—to at least offer some substantial assistance, whether he qualifies or not, or whether or not he meets whatever the criteria is. I am not really sure what that is; but wheter or not he could meet that criteria, I don't know. I know he's offered, but they may never come to see him. I called dozens of times for people to come talk to him, which is another factor that if they just don't—if no one decides who has the power to come see him—now, there is another way out and Mr. Meinecke and I have talked about this. I can do a proffer, which I will do in the statutory time, and hopefully that will be of some help. I have no way of knowing that.

I have tried to get the officers to come see my client to debrief him, and Moore County has no interest because what he knows isn't in Moore County. Randolph is where he does know something, but they, as of yesterday afternoon, have shown no interest in talking to him at all. I am stuck. I can't make people do what they don't want to do.

THE COURT: The discretion in still within the prosecution's office. You still have some room under 3555.

MR VAN CAMP: Oh, yes. Thank you, Your Honor.

THE COURT: Mr. Meinecke, do you want to be heard any further?

MR. MEINECKE: No, Your Honor.

THE COURT: Mr. Person, is there anything you would like to say on your own behalf before I render my decision? I will advise you that you have no obligation to say anything; but if you would like to speak, I will be happy to hear from you.

THE DEFENDANT: No, Your Honor.

THE COURT: All right. The Court notes that the total offense level is 21, criminal history category is 6, imprisonment range is 120 months.

The Court has taken into account the position papers of the parties and the arguments of counsel. The Court has also taken into account all the 3553(a) factors in determining an appropriate sentence in this case.

The sentence that will be imposed will be that which will be sufficient but not greater than necessary to meet the sentencing objectives of Section 3553(a) and any sentencing objectives that may apply as well under the guidelines. The Court finds that the sentence it will impose is 120 months, which is the statutory mandatory minimum in this case.

MR VAN CAMP: Your Honor, I am sorry. I should have mentioned this. I

did not. We are going to ask that—he has had a drug problem since he was 13. I would ask the Court to consider the drug rehab program for him as well as that he be able to be—I know this is just a recommendation by the Court, but he be situated some place in the general area. His mother is very ill. She is not here today.

THE COURT: Let me say for the record that I have considered the factors under 3553(a), as I have said, and have taken into account the defendant's prior criminal history in this case, which involves a misdemeanor simple possession of a controlled substance at age 29, a small amount of marijuana—there is no amount given in the presentence report, which is paragraph 36 and 38—felony possession with intent to sell and deliver marijuana, involving 12 ounces of marijuana.

I believe those are the only criminal drug charges; is that correct?

MR VAN CAMP: Yes, sir.

THE COURT: That without the statute mandatory minimum, the Court would have been inclined to have sentenced below the statutory minimum range, but the Court is bound by the statutory minimum in this case. For that reason, the Court will sentence at the statutory minimum but no more than that, which is 120 months.

So it is, therefore, ordered that the defendant be committed to the custody of the United States Bureau of Prisons for a term of 120 months followed by 8 years of supervised release.

The defendant is ordered to pay a special

assessment of $100. That is due and payable immediately. To the extent he cannot immediately comply, the Court will recommend that he participate in the Inmate Financial Responsibility Program. Any fine is waived based on inability to pay.

In addition to the usual terms of supervised release, it is ordered that the defendant shall provide any requested financial information to the probation officer. The defendant shall submit to substance abuse testing at any time as directed by the probation officer. The defendant shall cooperatively participate in the substance abuse treatment program, which may include drug testing and inpatient and residential treatment, and pay for treatment services as directed by the probation officer. During the course of the treatment, the defendant shall abstain from the use of alcoholic beverages.

The Court will recommend that the defendant be designated to a facility where he may be evaluated for and participate in drug counseling and drug treatment.

Any other requests on behalf of the defendant?

MR. VAN CAMP: No, Your Honor. Did I hear you say something about North Carolina?

THE COURT: He wants to be in a facility near North Carolina; is that correct?

MR. VAN CAMP: Yes, if possible.

THE COURT: I will recommend that he be designated to a facility as close as possible to North Carolina.

Do you understand, Mr. Person, that that's a decision that the Bureau of Prisons makes at its indiscretion based on the factors that affect their population and inmates? So that will be a decision that the prison system will make, but I will make that recommendation.

Mr. Meinecke, anything further from the Government?

MR. MEINECKE: I may have missed it. Did the Court order a special assessment?

THE COURT: I believe I did.

MR. MEINECKE: The court report is shaking her head. I must have missed it. I apologize for that.

MR. VAN CAMP: We would move to dismiss County One.

THE COURT: The Court will order that any remaining counts against the defendant be dismissed in the plea agreement without objection by the Government. Did you want a destruction order?

MR. MEINECKE: Yes, sir.

THE COURT: It is so ordered that at the expiration of the time for appeal that any drugs seized as a result be destroyed.

I understand your argument and you've preserved it for the record, if you want to take it to the Fourth Circuit. I did indicate that I would have sentenced below the guideline range in this case. In my evaluation of the 3553(a) factors, and that's taking into account all the conduct in this case as well, including the fact that he did commit this offense within four to six weeks of his release, as I

understand it--but for his prior history, I would have sentenced below the guideline range.

You can take that issue to the Fourth Circuit.

MR VAN CAMP: We are thinking about that.

THE COURT: --and they can decide what they want to do about that.

Have you advised your client about any rights of appeal?

MR VAN CAMP: I have not, but I will.

THE COURT: Please make sure he is aware, if he chooses to file notice of appeal, that he must do so in writing within ten days of the entry of the Court's judgment in this case?

MR VAN CAMP: Thank you.

THE COURT: Anything further from the Government?

Mr. Meinecke: No, sir, Your Honor.

THE COURT: We'll stand in recess until 2:00

(END OF PROCEEDINGS at 12:20P.M.)

******

BRIANA NESBIT, RPR OFFICIAL COURT REPORTER (336)254-7464

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

CERTIFICATE OF REPORTER

I, Briana L. Nesbit, Official Court Reporter, certify that the foregoing transcript is a true and

correct transcript from the record of the proceedings in the above-entitled matter.

Dated this 7th day of December 2009.

/s/ Briana L. Nesbit
Briana L. Nesbit, RPR
Official Court Reporter

No. 09-4986

In the
United States Court of Appeals
For the Fourth Circuit
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHAD HOWARD PERSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

PETITION FOR REHEARING

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Counsel for Appellant

STATEMENT OF PURPOSE

One June 4, 2010, the Fourth Circuit Court of Appeals entered a per curiam unpublished opinion in the matter of *United States of America v. Chad Howard Person*, Case No. 09-4986.

In petitioning the Court for a rehearing, the undersigned counsel for Defendant-Appellant Chad Person respectfully submits that this Court's opinion is in conflict with a decision of the United States Supreme Court. Specifically, counsel contends this Court's opinion is in conflict with *Graham v. Florida*, -- S.Ct. --, 2010 WL 194673 (2010) which was decided on May 17, 2010, merely three (3) weeks before this Court ruled in this case.

Pursuant to F.R.A.P. 28(j), the undersigned counsel submitted and filed a letter to the Clerk of the United States Court of Appeals for the Fourth Circuit on May 19, 2010 to advise the Court of the new controlling authority. A copy of that letter is attached to this Petition as Exhibit 1.

As argued in the May 19, 2010 letter to the Court, the United States Supreme Court clarified in *Graham* that proportionality review is "central" to the Eighth Amendment, and in applying Eighth Amendment proportionality analysis, district courts should apply Justice Kennedy's test from *Harmelin v. Michigan*, 501 U.S. 957 (1991). Id. at 6, 7.

"The controlling opinion in *Harmelin* explained its approach for determining whether a

sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence." *Graham*, 2010 WL 194671 at 7; *Harmelin*, 501 U.S., at 1005 (opinion of KENNEDY, J.) "[I]n the rare case in which [this] threshold comparison... leads to an inference of gross disproportionality" the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." Id. If this comparative analysis "validate[s] an initial judgment that [the] sentence is grossly disproportionate," the sentence is cruel and unusual. Id.

The Defendant contended in both his Brief and Reply Brief to the Court that Justice Kennedy's three-part test is the controlling law of the land. The Supreme Court's recent decision in Graham affirmed that exact argument. Accordingly, the undersigned counsel respectfully contend the Court's reliance on *United States v. Thomas*, 900 F.2d 37 (4th Cir. 1990) was errant.

REQUEST FOR REHEARING

The Defendant respectfully requests a rehearing solely on the issue of whether the mandatory minimum sentence imposed violates the Eighth Amendment where the district court did not conduct Justice Kennedy's three-part test from *Harmelin* and affirmed by *Graham*.

Based on the new authority of *Graham*, the

Defendant respectfully moves the Court to vacate his sentence and remand to the district court for resentencing.

CERTIFICATE OF COMPLIANCE

This brief has been prepared using Twelve Point, monospaced typeface (Courier New). This Petition does not exceed fifteen (15) pages.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or copy of the word or line print-out.
Respectfully submitted this the 16th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June 2010, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit the Required copies of this Petition for Rehearing and further certify that I mailed this same date the required copies to opposing counsel at the following address:

Attn: Terry Meinecke, Assistant United States Attorney
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VIA U.S. MAIL
May 19, 2010
Clerk, United States Court of Appeals for the Fourth Circuit
1100 East Main Street
Richmond, Virginia 23219

Re: Supplemental Authority for *United States v. Chad Howard Person*, No. 09-4986

Dear Sir or Madam:

Pursuant to F.R.A.P. 28(j), this letter serves to advise the Court of new controlling authority in Chad Person's appeal, No. 09-4986.

In *Graham v. Florida*, -- S.Ct. --, 2010 WL 1946731 (2010) decided May 17, 2010, the Supreme Court considered proportionality review of a defendant's sentence under the Eighth Amendment's Cruel and Unusual Punishments Clause. On page 8, footnote 3 of his Reply Brief filed February 12, 2010, the Appellant cited *Graham,* which was then pending before the Supreme Court.

"The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* at 6 (internal citations and quotations omitted).

The majority and concurring opinions of *Graham* relied on the controlling opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991) (and affirmed in *Ewing v. California*, 538 U.S. 11 (2003)) for determining whether a sentence for a term of

years is grossly disproportionate for a particular defendant's crime. *Graham*, -- S.Ct. --, WL 1946731 at 7. The Court employed the "narrow proportionality principle" prescribed in *Harmelin* which requires a sentencing court to "compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions" where there is an inference of gross disproportionality. *Id.* (internal quotations and citations omitted). "If this comparative analysis validate[s] an initial judgment that [the] sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.* (internal quotations and citations omitted).

In his concurring opinion, Justice Roberts rejected the majority opinion's categorical approach, but stated sentencing courts should follow the *Harmelin* and *Ewing* tests upon finding an inference of gross disproportionality. *Id.* at 19 (ROBERTS, J., concurring).

Based on the reasoning in *Graham*, the Appellant respectfully moves the Court to vacate his sentence and remand to the district court for resentencing.

Very truly yours,

/s/ Patrick M. Mincey

Patrick M. Mincey
cc: Terry Meinecke

EXHIBIT A

FIRST CIRCUIT

United States v. Cardoza, 129 F.3d 6, 18 (1st Cir. 1997)(interpreting "*Harmelin* to require a defendant seeking proportionality review to demonstrate, at the threshold, an 'initial inference of gross disproportionality,' between the "gravity of [the] criminal conduct and the severity of the...penalty' imposed.").

SECOND CIRCUIT

Matias v. Artuz, 8 Fed. Appx. 9, 10 (2d Cir. 2001)(citing Kennedy's *Harmelin* opinion in supporting the application of proportionality analysis to life sentences).

THIRD CIRCUIT

United States v. MacEwan, 445 F.3d 237, 247 (3d Cir. Pa. 2006)(following *Ewing*, "courts must examine three factors: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. When conducting this analysis, this Court has recognized that we "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.")(internal citations omitted).

FIFTH CIRCUIT

Austin v. Johnson, 328 F.3d 204, 210 (5th Cir. Tex. 2003)(holding "The Eighth Amendment proportionality principle applies to noncapital sentences and contains four principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality be reviewed by objective factors.").

SIXTH CIRCUIT

United States v. Hill, 30 F.3d 48, 50 (6th Cir. 1994)("In reviewing Eighth Amendment challenges, this circuit has adhered to the 'narrow proportionality principle' articulated in *Harmelin*.")

SEVENTH CIRCUIT

United States v. Gross, 437 F.2d 691, 692-3 (7th Cir. Ill. 2006)(explaining under plurality approach in *Ewing*, "first task is to ascertain whether [defendant's] case is 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'")(quoting *Ewing*).

EIGHTH CIRCUIT

Henderson v. Norris, 258 F.3d 706, 709 (8th Cir. 2001)("Since *Harmelin*, our court and others have applied the principles outlined in Mr. Justice Kennedy's opinion to [Eighth Amendment] cases...")

NINTH CIRCUIT

Andrade v. Attorney Gen. of Cal., 270 F. 3d 743 (9th Cir. 2001)("The Ninth Circuit follows the modified *Solem* test as articulated in Justice Kennedy's concurring opinion from *Harmelin*.")

TENTH CIRCUIT

United States v. Jones, 213 F.3d 1253, 1261 (10th Cir. 2000)("We have ruled that Justice Kennedy's plurality opinion...sets forth the applicable Eighth Amendment test.")

ELEVENTH CIRCUIT

United States v. Brant, 62 F.3d 367 (11th Cir. 1995)("In non-capital cases, the Eighth Amendment encompasses, at most, only a narrow proportionality principle.")(citing *Harmelin*).

EXHIBIT B

CALIFORNIA

Quevedo v. M.C.Kramer, 2009 U.S.Dist.LEXIS51314,49-50 (E.D.Cal.June 17,2009)("The Ninth Circuit, adopting Justice Kennedy's concurring opinion in *Harmelin*, now refers to the test articulated as "the rule of *Harmelin*.").

COLORADO

People v. Smith, 848 P.2d 365, 374 (Colo. 1993)("In analyzing the proportionality issue in the context of a non-habitual offender case, we agree with Justice Kennedy's conclusion in *Harmelin* that a narrow proportionality principle exists under the Eighth Amendment...and that the scope of this proportionality principle is limited by such countervailing principles as the primacy of the legislature in determining the types and limits of punishments for crimes.").

CONNECTICUT

State v. Higgins, 265 Conn. 35, 63 (Conn. 2003)("The governing principle that, to be unconstitutional, a sentence must be grossly disproportionate to the offense, is informed by four subsidiary principles. *Ewing v. California*, supra, 123 S.Ct.1186-87, citing *Harmelin v. Michigan*, 501 U.S. 957, 1001, 11 (1991)(Kennedy, J., concurring)."

DELAWARE

Crosby v. State, 824 A.2d 894, 904 (Del. 2003)("The Eighth Amendment...contains a "narrow proportionality principle" that "applies to noncapital sentences.")(quoting Justice Kennedy's *Harmelin* concurring opinion).

FLORIDA

Paey v. State, 943 So. 2d 919, 923 (Fla.Dist.Ct.App.2d Dist. 2006)("The Florida Supreme Court has interpreted the decisions in *Solem*, *Harmelin*, and *Ewing* as requiring that at a minimum a prison sentence must be grossly disproportionate to the crime to constitute cruel and unusual punishment solely because of its length.").

GEORGIA

Bradshaw v. State, 284 Ga. 675, 677(Ga. 2008)("Because Justice Kennedy's opinion in *Harmelin* (joined by O'Connor and Souter, JJ.) and Justice O'Connor's opinion in *Ewing* (joined by Rehnquist, C.J. and Kennedy, J.) reflect the views of the Justices concurring in the judgments on the narrowest grounds, those opinions are the controlling opinions.").

IDAHO

Fairchild v. Wright, 2006 U.S.Dist.LEXIS 64824, 24-25 (D.Idaho Aug. 30, 2006)(The Eighth Amendment contains a narrow principle that a sentence cannot

be grossly disproportionate to the offense. The Supreme Court has held that the requirement of sentencing proportionality is clearly established federal law, even in non-capital cases, but that 'the precise contours [of the rule] are unclear,' and an Eighth Amendment violation will be found 'only in the exceedingly rare' and 'extreme' case") (quoting Justice Kennedy's *Harmelin* concurring opinion).

ILLINOIS

People v. Hindson, 301 Ill.App.3d 466, 478 (Ill.App.Ct.2d Dist. 1998)("Here, we do not believe that this is the 'rare' case that supports an inference that the defendant's sentence was grossly disproportionate to his offense.")(quoting Justice Kennedy's *Harmelin* concurring opinion).

IOWA

State v. August, 489 N.W.2d 740,743 (Iowa 1999)("Justice Kennedy's opinion in *Harmelin* sets out the principles relevant to a proportionality review...").

MAINE

United States v. Polk, 508 F.Supp. 2d 89, 96 (D.Me.2007)("Justice Kennedy's limitation on the need for comparative analysis seems to have become a consensus.")

MARYLAND

Thomas v. State, 333 Md. 84, 94 (Md. 1993)("The approach outlined by Justice Kennedy's opinion in *Harmelin* is consistent with the approach we earlier approved)(citing *State v. Davis*, 310 Md. 611, 530 A.2d 1223 (1987)).

MASSACHUSETTS

United States v. Wilder, 2006 U.S. Dist. LEXIS 10155, at 6-7(D.Mass.Mar.10, 2006)("Furthermore, the Supreme Court's recent plurality opinion in *Ewing v. California* stands for the proposition that a sentence can only be considered cruel and unusual if "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality")(quoting Justice Kennedy's *Harmelin* concurring opinion).

MICHIGAN

Usher v. Metrish, 2006 U.S.Dist.LEXIS 28958, 25-26(E.D.Mich.Mar.27, 2006)("More recently, the Supreme Court again considered the proportionality issue under the Eighth Amendment, resulting in a split similar to that it reached in *Harmelin*. In *Ewing*, a three-justice plurality reaffirmed Justice Kennedy's approach in *Harmelin*, concluding that the Eighth Amendment contains a narrow proportionality principle which forbids sentences which are grossly disproportionate to the offense...)(internal citations omitted).

MISSOURI

State v. Dillard, 158 S.W.3d 291,302 (Mo.Ct.App.2005)("The intrajurisdictional and interjurisdictional analyses in the second and third factors, however, need only be undertaken "in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.")(quoting Justice Kennedy's *Harmelin* concurring opinion).

NEBRASKA

Witmer v. Houston, 2006 U.S.Dist.LEXIS 90518, 29-30 (D.Neb.Dec.14,2006)("This 'gross disproportionality principle' articulated in Justice Kennedy's concurrence in *Harmelin*...is clearly the established Federal Law, as determined by the Supreme Court, which governs the petitioners third § 2254 claims, insofar as the petitioner relies on the disparity between his prison sentence and those that his co-defendants received or the sentence he speculates he might receive upon a new plea or trial.").

NEW JERSEY

Watford v. Hendricks, 2007 U.S. Dist. LEXIS 31091 (D.N.J. Apr. 27, 2007)("More recently, Justice Kennedy has explained that *Solem* does not mandate comparative analysis within and between jurisdictions...and he has identified four principles of

proportionality review—"the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that the proportionality review be guided by objective factors"—that "inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence.").

NEW HAMPSHIRE

Fischer v. N.H. Parole Bd., 2006 DNH 99 (D.N.H. 2006)("A majority of the Justices of the Supreme Court have interpreted that conditional provision to include "a narrow proportionality principle" that 'applies to noncapital sentences.'")(quoting Justice Kennedy's *Harmelin* concurring opinion).

NEW YORK

Bottom v. Pataki, 2006 U.S. Dist. LEXIS 55046 (N.D.N.Y. Aug. 7, 2006)("Moreover," [the] Eighth Amendment 'forbids only extreme sentences that are grossly disproportionate to the crime...")(quoting Kennedy's *Harmelin* concurring opinion)(internal quotations omitted).

OHIO

State v. Hairston, 118 Ohio St. 3d 289, 293 (Ohio 2008)("In State v. Weitbrecht, 86 Ohio St. 3d 368, (1999) we applied Justice Kennedy's Eighth Amendment analysis in his concurring opinion in *Harmelin*.")

PENNSYLVANIA

Commonwealth v. Spells, 417 Pa.Super.233, 244-5 (Pa.Super.Ct.1992)("Interpreting the three objective factors established by Justice Powell in *Solem*, Justice Kennedy found that *Solem* did not establish a rigid three-part test. While recognizing *Solem's* holding that, in determining unconstitutional disproportionality, no one factor will be dispositive in a given case...Justice Kennedy opined that one factor may nevertheless determine the constitutionality of a particular sentence: *Solem* is best understood as holding that comparative analysis within and between jurisdictions is not always relevant to proportionality review. The Court stated that 'it may be helpful to compare sentences imposed on other criminals in the same jurisdiction and that courts find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions'...It did not mandate such inquiries. A better reading of our cases leads to the conclusion that intra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality...The proper rule for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime.)(quoting Justice Kennedy's *Harmelin* concurring opinion)(internal citations omitted).

RHODE ISLAND

McKinney v. State, 843 A.2d 463, 469 (R.I. 2004)("Based on our reading of the above discussed Supreme Court precedent, we hold that the Eighth Amendment contains a "narrow proportionality principle," which we adopt. The overriding inquiry for determining "proportionality" is whether the sentence is commensurate with the gravity of the crime. In making that determination, a court is guided by certain principles "that give content to the uses and limits of proportionality review." Namely, the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors" and that strict proportionality between the crime and sentence is not necessary because the Eighth Amendment only forbids extreme sentences that are disproportionate. Further, the Eighth Amendment does not require a comparative analysis "within and between jurisdictions." A comparative analysis may, however, be appropriate when it is determined that the sentence is not commensurate to the gravity of the crime. In any case, the "gross disproportionality principle reserves a constitutional violation for only the extraordinary case."(internal citations omitted).

SOUTH CAROLINA

State v. Brannon, 341 S.C. 271, 281)(S.C.Ct.App.2000) ("Because our comparative

analysis of the most serious offense subsections found in § 17-25-45 does not raise an "inference of gross disproportionality," we need not review the two remaining factors outlined in *Solem*.")(quoting Kennedy's *Harmelin* concurring opinion).

SOUTH DAKOTA

Raymond v. Weber, 2008 U.S.Dist.LEXIS 19165 (D.S D.Mar.5, 2008)(The Eighth Amendment...requires an inquiry into whether a punishment is 'grossly disproportionate' to the crime") (quoting Justice Kennedy's *Harmelin* concurring opinion).

TENNESSEE

Van Tran v. State, 66 S.W.3d 790, 830-31 (Tenn.2001)(" The first inquiry under this test is to compare the sentence with the crime committed to determine whether the 'comparison leads to an inference of gross disproportionality.' If an inference so arises, then 'the analysis proceeds by comparing (1) the sentences imposed on other criminal in the same jurisdiction, and (2) the sentences imposed for commission of the same crime in other jurisdictions.' (internal citations omitted).

TEXAS

Caddell v. Quarterman, 2007 U.S.Dist. LEXIS 14065 (S.D.Tex.Feb.27,2007)("Punishment assessed within statutory limits generally is not excessive, cruel, or unusual. Petitioner does not dispute that his

punishment was within the state statutory limits. A narrow exception to this rule is recognized where a sentence is 'grossly disproportionate' to the offense")(internal citations omitted).

VIRGINIA

Dunaway v. Commonwealth, 52 Va.App.281,312 (Va.Ct.App.2008) ("[T]he Court has since 'substantially narrowed that approach and instructed that courts should not go beyond the first prong in most cases'...Thus, we examine the sentence at issue in relation to the crime only for 'gross disproportionality.' Only if we find such gross disparity will we proceed further with the analysis. It is only the 'rare case' that a 'threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'"(citation omitted)(quoting *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999)).